

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 22, 2008

**STATE OF TENNESSEE v. MICHAEL LEE DAVENPORT**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2002-C-1638 Cheryl Blackburn, Judge**

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**No. M2006-01693-CCA-R3-CD - Filed June 10, 2008**

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A Davidson County jury convicted the Defendant, Michael Lee Davenport, of aggravated sexual battery, and the trial court sentenced him to eleven years in prison. On appeal, the Defendant alleges the following errors: (1) the trial court erred by preventing him from introducing extrinsic evidence about an alternate source of the victim's sexual knowledge; (2) the trial court erred by not granting his motion for judgment of acquittal; and (3) the trial court erred when sentencing him. After a thorough review of the record and applicable law, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., J., joined. DAVID H. WELLES, J., concurred in the result.

Paul Walwyn (at trial), Madison, Tennessee, and Nathan Moore (on appeal), Nashville, Tennessee, for the Appellant, Michael Lee Davenport.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Brett T. Gunn and Bernard F. McEvoy, Assistant District Attorneys General, for the Appellee, the State of Tennessee.

**OPINION**

**I. Facts**

**A. Trial**

The State presented the following evidence at trial: Kimberly Patterson, the victim's mother, testified that she had four children and one stepchild from her second husband. Her oldest child, the victim in this case, was born in California. While in California, Patterson married a man with whom

she had her second child, A.P.<sup>1</sup> Patterson's husband was subsequently murdered, so she moved with her two children to Tennessee to be closer to family. After moving to Tennessee, Patterson met her second husband, and they eventually had two children together, B.P. and J.P. Patterson's relationship with her second husband then began to break down, and Patterson had difficulty finding a steady place to live. Although Patterson and her second husband remained married, they became separated for a period of time.

After meeting the Defendant's estranged wife at a bowling alley, Patterson came to know the Defendant. The Defendant eventually persuaded Patterson to move in with him at his parents' house. Patterson stated that the Defendant wanted to be "daddy" to her children, and she thought that was "okay" because they needed a father figure. Patterson started to become concerned about the Defendant's relationship with the victim when she noticed the Defendant holding the victim as "if you hold your girlfriend or your boyfriend or something." Patterson stated that the victim sat on the Defendant's lap, and the Defendant rubbed the victim's back and leg the way "boyfriends would." The Defendant spent time with the victim alone, which he did not do with the other children. The Defendant also bought things for the victim that Patterson could not afford, and she once saw him kiss the victim on the lips, which upset Patterson.

Patterson testified that she and the Defendant's mother confronted the Defendant about his actions because the victim was only ten years old, and, in response, the Defendant "got mad, went [into] his room and slammed his door." On another occasion, Patterson complained to the Defendant about his conduct, and the Defendant responded that Patterson was simply "jealous." Eventually, Patterson moved her four children out of the Defendant's home, prompted mainly by the Defendant's refusal to allow Patterson to date. After finding her next living arrangements insufficient, Patterson moved her four children back in with the Defendant. Also living at the house at that time were the Defendant's parents, grandmother, brother, and nephew.

Patterson described the living arrangements: the Defendant lived downstairs, and the rest of the family lived upstairs. The Defendant could close his door for privacy. Patterson and her children moved in downstairs with the Defendant, and Patterson slept in the living room. Her two oldest children, including the victim, stayed in an addition to the Defendant's portion of the house. Patterson stated that she only stayed with the Defendant for two weeks until she moved out and attempted to find residency with her husband. During these two weeks, the victim stayed with the Defendant. Patterson noticed in this short period, however, that the Defendant was again frequently "hugging" the victim. Patterson stated that, when she moved out, she was not particularly concerned about leaving the victim with the Defendant because she thought she was just being "paranoid." Shortly after Patterson moved out of the house, A.P. told her that the victim was sleeping in the Defendant's bed, not in the addition where she was supposed to be sleeping.

Patterson stated that, in total, the children stayed with the Defendant for three months after Patterson moved out of his house. Patterson then obtained housing and moved her children back in

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<sup>1</sup>As is the custom of this Court, we will refer to minors by their initials.

with her. After deciding that she did not want the children to change schools, the Defendant made arrangements to take them to and from school. During this time, Patterson began to question the victim as to whether “something” had occurred at the Defendant’s home. After first responding that nothing happened, the victim then told Patterson that the Defendant “touched” her. Patterson called the police and told the Defendant he could no longer see the children. Patterson stated that the victim did not want to discuss the situation with her. In addressing the working habits of the members of the Defendant’s house, Patterson stated that the Defendant’s mother worked long hours, but the Defendant’s father did not work at all. He, however, ran errands frequently.

On cross-examination, Patterson testified that her relationship with the Defendant was never romantic; they were, however, engaged for one month. When she moved in with the Defendant, she was pregnant with her youngest child and on welfare. She paid the Defendant’s family rent, but the Defendant provided things for the children and often took them to school. A.P., Patterson’s second oldest daughter, was not as close with the Defendant as was the victim. Patterson stated that she left the Defendant’s residence the first time because he did not want her to date. She admitted that this could be because she had broken off their engagement. Patterson also stated that she “experimented” sexually with the Defendant’s wife.

The victim testified that, in the fourth grade, she was taught by Ms. Spear. During this period of time, she lived with the Defendant, and they often shopped and did other fun activities together. The victim stated that she liked the Defendant until the night when she was asleep on the couch, and the Defendant picked her up and carried her to his bed. The Defendant removed his pants and his underwear. He lifted the victim’s shirt and started “humping” her. The victim stated that her legs were spread because the Defendant spread them with his hands. The victim pushed the Defendant off of her with her hands and feet. She ran back into the living room and locked the door to that room because she was scared. The victim stated that her panties stayed on during this encounter. Later, the Defendant told the victim not to tell anyone about what happened.

The victim further testified that, on a number of occasions, she and A.P. slept in the bed with the Defendant; the victim stated nothing occurred during these times. The victim testified that, prior to this time, she did not know about sex. The Defendant explained to her what sex would be like, and that during her first sexual encounter a man would “pop” her “cherry.” The Defendant told her that sex would feel good, and it would perhaps occur on a waterbed with baby oil and rose petals. The victim stated that she did not tell anyone for days because she was scared. Ultimately, she told her mother and Ms. Spear, her teacher, what happened. Additionally, the victim recalled that the Defendant would walk her to her classroom and kiss her on the lips. The victim stated that she called the Defendant “daddy” because she trusted him. Additionally, when questioned about whether she engaged in oral sex with her cousin, the victim responded that she did not.

On cross-examination, the victim testified that it was her idea to call the Defendant “daddy.” She stated that, after the incident, she stayed at the Defendant’s house for almost a week. She never discussed additional sexual encounters with the Defendant, particularly concerning her cousin. On redirect-examination, she stated that the incident happened after the Defendant broke his arm.

Detective David Zoccola, of the Metropolitan Police Department, explained the procedures his department goes through in investigating allegations of sexual abuse. He is taught to say things he does not necessarily believe in order to obtain the truth from a suspect. One technique is to minimize the assault, which is the tactic employed in this case. Additionally, Detective Zoccola placed some blame on the victim, drugs and alcohol, and emphasized DNA tests. In investigating this case, Detective Zoccola went to the Defendant's place of work and requested that they meet in his car. The Defendant knew he was being tape recorded and agreed to the interview.

The State then played a tape recording of the interview for the jury. In the interview, the Defendant indicated that Patterson called him a month before the interview and implied that he molested the victim. The Defendant explained the situation, stating that he took in Patterson and her children, took care of them, and then asked them to leave his house. He eventually allowed them to return, but shortly thereafter Patterson returned to live with her husband, who the Defendant termed an "alcoholic." The Defendant claimed that, once Patterson heard the Defendant was again talking to his wife, Patterson became angry and retrieved her children. The Defendant stated that no one ever slept with him in his bed and initially denied the accusations. He also told the detective that that he regularly slept in his clothes, boots, hat, and glasses.

During the interview, the Defendant further stated that the victim told him that she was having oral sex with her cousin. He felt the victim was exposed to sexual ideas before living with him. The Defendant maintained that, as far as he could remember, the only possible explanation was that he was on medication from his broken arm, sleeping naked in the bed, and the victim came and got on top of him to act out things. He stated they never discussed sex. The Defendant then admitted it was possible, when he was drugged up on pain medication, that he carried the victim from the couch to his room. The State then introduced photographs of the Defendant's home.

On cross-examination, Detective Zoccola testified that he had two sources of information when he interviewed the Defendant: the Department of Children's Services ("DCS") interview with the victim and Patterson's initial complaint with a short narrative. The Defendant was cooperative during the interview, and, although the Defendant offered to turn himself in if the need were to arise, that was not police practice. Detective Zoccola stated that he arrested the Defendant after the grand jury indicted him. After the interview, Detective Zoccola interviewed the victim's teacher but not other family members. On redirect examination, Detective Zoccola stated that he had no information suggesting there was anyone other than the victim in the room the night of the incident.

Kyla Wilson, a teacher at Neely's Bend Elementary School, testified that it was her practice to stand outside classrooms as the children walked to class, so her children would arrive at class without any problems. Although the victim was not her student, Wilson remembered her specifically. In particular, she recalled seeing the victim one day with her younger sister and what appeared to be a father figure walking to class. What struck Wilson as odd was that the father figure did not walk the younger child to class but the older one. On another day, Wilson recalled seeing the victim and this same man walking to class. When the victim turned to go into the classroom, the man pulled her back by her arm and moved to kiss the victim. The victim turned her head away, but

the man gave her a kiss on the lips anyway. Immediately after this occurred, Wilson spoke to the victim's teacher, Ms. Spear, and told her about her concerns. After their discussion, Ms. Spear began to linger in the hallway in order to watch for further occurrences. On cross-examination, Wilson testified that she saw the father figure kiss the victim on a number of other occasions, too.

Bobette Spear, the victim's teacher at Neely's Bend Elementary School, testified that the victim was a good math student but was a "resource" student in language. Although she did not make "great grades," the victim worked very hard and was well behaved. On one occasion, Spear met with Patterson and the Defendant, whom she considered to be Patterson's boyfriend, concerning the victim's schooling. Spear stated that Wilson alerted her to watch for inappropriate contact between the Defendant and the victim. As such, Spear began to linger in the hallway more frequently. One day, she witnessed something that made her uncomfortable: the Defendant walked the victim to the classroom and asked her to kiss him. The victim, with a "strange" look on her face, "leaned her cheek up to him," but he turned her chin and kissed her on the lips. The victim then immediately put her head down and walked to her desk. Spear stated that, in twenty-nine years, she had never witnessed a parent kiss a child on the lips in this circumstance.

Spear testified that she discussed the situation with the victim who stated that she was uncomfortable when the Defendant kissed her, and she began to cry. The victim told Spear that the Defendant touched her, and her mother was calling the police that day. When further questioned, the victim explained to Spear that the Defendant picked her up off the couch one night, took her to his bed, kissed her, and "humped" her. Spear called the police to report the what the victim told her and was notified that Patterson had already reported the incident. Spear never saw the Defendant again. On cross-examination, Spear testified that the day she saw the Defendant kiss the victim was the same day the victim told her about the incident. Spear stated that the kiss was "very short."

Lisa Dupree, a social worker at Our Kids Center at Nashville General Hospital, testified that they perform triage on children alleged to be victims of sexual abuse. They gather information and pass that along to medical and criminal personnel. Dupree recalled seeing and interviewing the victim who told her that the Defendant removed her from a couch and took her to his bedroom. She told Dupree that the Defendant removed his and her clothes and rubbed his private area against hers. Staff performed a medical exam on the victim, and that exam produced results within the "normal range." On cross-examination, Dupree testified that the victim was alone during this interview. With these witnesses, the State rested its case-in-chief.

The Defendant presented the following evidence: Terrisa Davenport, the Defendant's wife, testified that they had been separated for nine or ten years. Despite this, they still had a "talking" relationship. Davenport stated that she and Patterson were "girlfriends" at one point, and she was friends with Patterson's children. She introduced Patterson to the Defendant, and, eventually, Patterson and her children moved in with the Defendant. Davenport witnessed the Defendant interact with the children and described their interaction as "always playing around."

On cross-examination, Davenport stated she was unaware that the Defendant slept with eight

and ten-year-old girls in his bed. She had seen the Defendant kiss the victim on the cheek, hug her, and carry her around. She did not know that the Defendant was prone to buy the victim clothes, shoes, and jewelry. She further stated that she did recall the Defendant sleeping in shorts, shirts, sweat pants, and the like, but she did not recall him ever sleeping in his shoes. Davenport did, however, recall the Defendant sleeping in his glasses.

Janice Davenport, the Defendant's mother, testified that the Defendant's "ex-wife" introduced Patterson and her children to the Defendant. She stated that Patterson was homeless, and they attempted to assist her and her children. Patterson lived with them once, and her children came to live with them again without her. She testified that, if Patterson wanted to see her children, the Defendant would take the children to her.

Davenport stated that, when Patterson lived with them, she would "talk about anything in front of the children" on the telephone. At this point, the State objected to any further testimony on this issue based on hearsay. The attorneys approached the bench for discussion, and outside the earshot of the jury the trial court stated it was "more interested in the relevance" of the issue. The Defendant responded that the testimony was relevant to whether the victim gained sexual knowledge from someone other than the Defendant. The court responded that the victim never stated "she had the conversation only with him and no one else." Further, the court stated, "the only way this comes in is if it's a prior inconsistent statement[, a]nd you never asked the question, did you not ever talk to anybody else about it? You never asked her that." Ultimately, the court found, "One, it doesn't come in because it's hearsay. It doesn't come in because it's not showing a prior inconsistent statement."

Janice Davenport further testified that the children always called the Defendant "daddy." She stated there was never an occasion when she saw the children in the bed with the Defendant. She never witnessed the Defendant kiss the girls on the lips, and he would only carry them around as much as any other father would.

On cross-examination, Davenport explained the living arrangements and stated that, despite the entrance and exit from the Defendant's area of the house, she always knew what was happening down in his area. Davenport admitted, however, that she worked twelve hour days, so the Defendant had plenty of time at home without her. She stated that she woke them up every morning, and she never found the girls in the bed with the Defendant. Although she had not seen the Defendant sleep in boots, he did often sleep in clothes and a hat. Davenport stated that she felt as though she knew what was happening during the night because she used the restroom many times a night, and, when doing this, she would check on the children.

Robert Davenport, the Defendant's father, testified that Patterson and her children moved in with them at one point, and then the children later moved in again. He stated that the children called him "Papaw," and he helped provide clothing and necessities for them. The children called the Defendant "dad," and he disciplined them when necessary. The Defendant also showed affection for the children, and he would hug and kiss them as a father would. Davenport stated that the

children ultimately moved out when the Defendant asked Patterson for money for the children. The Defendant and Patterson's "boyfriend" got into an argument, and the children left the house.

On cross-examination, Robert Davenport stated that he was the "alarm clock" of the house. When he awoke, he woke up everyone else to get ready for school or work. Davenport stated that, when the Defendant was on his medication, he was very sleepy. Although the girls were sometimes alone with the Defendant, Davenport saw nothing that concerned him. He stated that the Defendant still slept in his clothes.

After Robert Davenport was excused, the trial court revisited the issue of Janice Davenport's testimony about Patterson's statements about sex to the victim. The Defendant's attorney stated that Davenport would testify she heard Patterson tell the victim that the first time she had sex would be "beautiful" and that her "cherry" would "burst." Davenport would testify that she told Patterson the conversation was inappropriate, and then the conversation ceased. The court reiterated that the statement was hearsay. In the court's view, the only possible exception would be a prior inconsistent statement. The court found, under *State v. Martin*,<sup>2</sup> that Patterson would first need to be questioned about the issue and given the opportunity to affirm or deny making the statement. The court added that the issue was extraneous to the issues in this case. On this evidence, the jury found the Defendant guilty of aggravated sexual battery.

### **B. Sentencing Hearing**

At the sentencing hearing, the following evidence was presented: Robert Davenport testified that the Defendant had a learning disability and, as such, had trouble in school. After graduating from high school, the Defendant worked for Earl Dunn Pontiac. While working there, he slipped and fell, hurting his back. After the incident, the Defendant collected disability checks and worked small jobs around a junkyard. Davenport stated that the Defendant treated Patterson's children well, especially considering their mother "would do nothing for them."

On cross-examination, Davenport stated that, in his younger days, the Defendant would become intoxicated at Denim and Diamonds, a local bar. Davenport also admitted that he caught the Defendant driving home drunk on one occasion. Although there were other allegations of inappropriate contact between the Defendant and another little girl, no charges were ever filed.

The Defendant testified that he hoped to get the least amount of time in jail as possible because he needed to take care of his father. The Defendant also maintained his innocence. On cross-examination, the State read a portion of the Defendant's interview with Detective Zoccola in which he stated that he drove home from Denim and Diamonds "drunker than hell" every night. The Defendant disputed this, saying he only drove drunk once.

In sentencing the Defendant, the trial court started at the minimum eight year sentence and

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<sup>2</sup>964 S.W.2d 564 (Tenn. 1998).

enhanced the sentence to twelve years based on the Defendant's abuse of a position of private trust. The court then mitigated the sentence to eleven years based on the Defendant's low IQ. It is from this judgment that the Defendant now appeals.

## **II. Analysis**

On appeal, the Defendant alleges the following errors: (1) the trial court erred in preventing him from introducing extrinsic evidence about an alternate source of the victim's sexual knowledge; (2) the trial court erred in not granting his motion for judgment of acquittal; and (3) the trial court erred in sentencing him.

### **A. Sexual Knowledge**

The Defendant first argues that the trial court erred in refusing to allow Janice Davenport, the Defendant's mother, to testify that she heard Patterson, the victim's mother, discuss with the victim what her first time having sex would be like. The State initially objected based on hearsay, and the discussion then turned to relevance. Ultimately, the court determined Davenport's testimony was hearsay not within any exception. The only possible exception, in the trial court's view, was that the testimony would show a prior inconsistent statement on the part of one of the witnesses – the victim or Patterson. The trial court found, under *State v. Martin*, 964 S.W.2d 564 (Tenn. 1998), that in order to question Janice Davenport about whether she heard Patterson discuss sex with the victim, the Defendant must first question Patterson or the victim on the issue.

The admissibility, relevancy, and competency of evidence are matters entrusted to the sound discretion of the trial court. With that principle in mind, we review the trial court's evidentiary rulings for an abuse of discretion. See *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Gray*, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997).

We will begin addressing whether the statement is admissible under the rules of evidence by examining its relevancy. Under Rule 401, "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 states, "All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible."

The victim testified she learned from the Defendant that, when she first had sex, someone would "pop" her "cherry," and this might occur on a waterbed with rose petals and baby oil. We conclude that Davenport's testimony is relevant to whether the victim was being truthful when declaring she gained this sexual knowledge from the Defendant. Because the evidence is relevant, it is admissible unless another rule or law serves to exclude it.

Rule 802 serves to exclude relevant evidence if it is hearsay. Under Rule 801, "Hearsay"



is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The statement in issue, that Patterson told the victim that the first time she had sex would be “beautiful” and that her “cherry” would “burst” was not being introduced to prove the truth of the matter asserted. Instead, the statement was being introduced to show the victim heard the statement made by Patterson, and thus the victim could have gained her sexual knowledge from someone other than the Defendant. As such, the statement is not hearsay and is therefore not excluded by Rule 802.

We turn to the ultimate reason the trial court determined the evidence should be excluded: the Defendant failed to lay a proper foundation before introducing extrinsic evidence in violation of Tennessee Rule of Evidence 613(b) and *State v. Martin*. In *Martin*, the Tennessee Supreme Court confronted the question of whether a foundation needs to be laid before introducing extrinsic evidence about a prior inconsistent statement. 964 S.W.2d at 565-66. In that case, the defendant was on trial for especially aggravated robbery of a clothing store. *Id.* The defendant’s girlfriend, Berry, testified as an alibi witness that she and the defendant were together when the robbery occurred. *Id.* at 566. On cross-examination, Berry stated that, when they were first arrested for the crime, she did not tell the detective that they were together at her apartment. *Id.* On rebuttal, the detective was called to the stand, and he testified that the defendant asked him when the robbery occurred. *Id.* The defendant then turned to Berry and asked her if she recalled where he had been on the night in question. *Id.* Berry responded, “I don’t know where you were, I was in the motel.” *Id.*

The Tennessee Supreme Court ruled that, in order to introduce the prior inconsistent statement, a foundation must be laid. *Id.* at 567. Among other things, the witness must be allowed to admit, deny, or explain the statement. *Id.* If the witness admits making the statement, the prior inconsistent statement is inadmissible. *Id.* If the statement is denied, however, the prior inconsistent statement may be admitted on the issue of credibility but not as substantive evidence. *Id.* (citing *State v. Reece*, 637 S.W.2d 858, 861 (Tenn. 1982)). Based on this, the Court ruled that Berry’s prior inconsistent statement should not have been admitted because she was not first questioned about whether she made the statement. *Id.* at 568.

In our view, this case presents a slightly different posture from *Martin*. In *Martin*, the State introduced a prior inconsistent statement of a witness in order to challenge the credibility of that same witness. Here, the statement was not being introduced to call into question the credibility of Patterson, the one who made the statement. Instead, the statement was meant to call into question the victim’s assertion that she gained the sexual knowledge from the Defendant. *Martin* and Rule 613 dictate by their specific terms that the rule is applicable to those *making* the statement. The rule mentions nothing about whether a foundation must be laid before calling into question the credibility of one who *hears* the statement. Rule 613(b) specifically states, “Extrinsic evidence of a prior inconsistent statement *by a witness* is not admissible unless and until *the witness* is afforded an opportunity to explain or deny the same . . . .” Thus, the question before us is whether the *Martin* rule, and by implication Rule 613(b), should be extended to statements questioning the credibility of one hearing the statement – i.e., should the Defendant have asked the victim, “Did you hear your

mother talk about how your first time should be ‘beautiful’ and your ‘cherry’ will be ‘popped’?” This is what the trial court concluded the Defendant should have done before calling a witness to offer extrinsic evidence that the conversation took place.

From our review of case law and treatise material, we cannot find one instance of the rule being extended to one who hears a statement. Despite this, it might be logical to extend the rule based on the rule’s reasoning. In *Martin*, the Court explained the rationale for the rule:

Confronting a witness prior to the introduction of extrinsic evidence provides for an orderly presentation of evidence and testimony. Time is saved if the witness unequivocally admits to having made the prior statement. Moreover, confronting a witness with an inconsistency prior to the introduction of the extrinsic evidence lessens the risk that a jury will consider the evidence as substantive evidence.

964 S.W.2d at 567. Although we are not particularly concerned with the jury using the evidence substantively in this case, the remaining justifications apply: evidence will be presented in a more orderly fashion and time will be saved if the victim is first questioned about whether she heard this statement. If she admits hearing the statement, there would be no need to question Janice Davenport on the issue.

Although this is perhaps a logical extension under this set of facts, the drafters of the rule have chosen not to extend the rule applicable to those making statements to those hearing the statement. Further, we can find no case extending the rule, as was done here, or even analyzing whether the rule should be extended to those who hear statements. Because we conclude another rule of evidence properly addresses this issue, we see no need to extend this rule.

By its definition, Rule of Evidence 412, generally considered the “Rape Shield Law,” applies to “sexual behavior.” See Tenn. R. Evid. 412(c). “Sexual behavior” is further defined by the rule as “sexual activity of the alleged victim other than the sexual act at issue in the case.” Tenn. R. Evid. 412(a). “This broad definition ‘deals with sexual intercourse as well as every other variety of sexual expression.’” *State v. Sheline*, 955 S.W.2d 42, 47 n.6 (Tenn. 1997) (considering the victim’s kissing another person on the evening of the offense under Rule 412) (quoting Neil P. Cohen, et al., *Tennessee Law of Evidence* § 412.2, at 241 (3d ed. 1995)). Tennessee Law on Evidence, cited in *Sheline*, further expounds on “sexual behavior” as follows:

The term sexual behavior embraces all types of sexual conduct, including heterosexual and homosexual behavior. It also deals with sexual intercourse as well as every other variety of sexual expression. It may include fetishes as well as pre- and post-intercourse behavior. However, “sexual behavior” does not include prior false allegations of rape. This information does not involve sexual expression, which is the essence of “sexual behavior” under Rule 412.

Neil P. Cohen, et al., *Tennessee Law of Evidence* § 4.12[3][b], at 4-176 (5th ed. 2005) (internally

citing *State v. Wyrick*, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001)). As noted above, in *Wyrick*, this Court concluded that false allegations of rape are not “sexual behavior.” In our view, a conversation about sex is more akin to “sexual expression” and “pre- and post-intercourse behavior” than a false allegation of rape. Within the spirit of the rule, we can certainly envision a scenario when a Defendant would like to question a victim about her history of sexual discourse, as it might be especially probative of the victim’s basis for sexual knowledge. See Tenn. R. Evid. 412(c)(4)(ii). Face to face conversation, internet discussion, and phone discussions would all fall under this rule. As such, we conclude that a conversation about sex is “sexual behavior” and falls under Rule 412.

Therefore, pursuant to Rule 412, “Evidence of specific instances of a victim’s sexual behavior is inadmissible” unless certain procedures are followed. As applicable to this case, “the sexual behavior was with persons other than the accused . . . to prove or explain the source of . . . knowledge of sexual matters.” Davenport’s testimony in this case would have been that the victim discussed sex with her mother; thus, this requirement is satisfied. Next, the Defendant would have needed to follow the procedural requirements outlined in subsection (d).

Subsection (d) first requires the Defendant to file a written motion to offer such evidence. Tenn. R. Evid. 412(d)(1). Once the motion is filed, the court is required to hold a hearing to determine if the evidence is admissible under the rule. Tenn. R. Evid. 412(d)(2)-(4). In this case, there is nothing in the record to show the Defendant filed such a motion prompting a hearing. Because the Defendant failed to follow the procedural requirements of Rule 412, the evidence should not have been admitted.

Although not argued or briefed by the Defendant, in some instances the exclusion of evidence may violate the Defendant’s right to present a defense. See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Brown*, 29 S.W.3d 427, 431 (Tenn.2000). In order to address this issue, we would need to find plain error on the part of the trial court. See Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b); *State v. Adkisson*, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994). Among the requirements needed to find plain error, one is that “a clear and unequivocal rule of law must have been breached.” *Adkisson*, 899 S.W.2d at 641 (citations omitted). To answer this question, we must analyze the law on the Defendant’s right to present a defense.

In determining whether a Defendant’s right to present a defense has been violated, we should consider: (1) Whether the excluded evidence is critical to the defense; (2) Whether the evidence bears sufficient indicia of reliability; and (3) Whether the interest supporting the exclusion of evidence is sufficiently important. *State v. Flood*, 219 S.W.3d 307, 317 (Tenn. 2007) (citations omitted). In analyzing these factors, we conclude that an argument may be made that the evidence does not bear a sufficient indicia of reliability because the Defendant’s mother was giving the evidence. Additionally, we conclude that an argument may be made that the interests supporting the exclusion of the evidence are important because the procedural requirements of the Rape Shield Law are needed to “ensure the victim’s privacy is not inappropriately compromised.” Tenn. R. Evid. 412, Advisory Comm’n Cmts. Ultimately, because of the nature of this factor test and the arguments in support of the exclusion of the evidence, we cannot conclude that a “clear and unequivocal rule of

law was breached in this case.” Because no “clear and unequivocal” rule of law was breached, we cannot review the issue under the plain error doctrine.

Ultimately, we agree that the Defendant should not have been allowed to question Janice Davenport because, although the questioning concerned sexual behavior used to prove an alternate source of sexual knowledge, the Defendant failed to follow the procedural requirements for admitting the evidence. Although we come to our conclusion under a different rule, we agree with the result of the trial court’s ruling. Thus, the trial court was not in error to exclude the testimony of Janice Davenport. The Defendant is not entitled to relief on this issue.

### **B. Motion for Judgment of Acquittal**

The Defendant next contends that the trial court erred in denying his motion for judgment of acquittal. We apply the same standard when reviewing whether a trial court erred in denying a motion for judgment of acquittal as when reviewing whether the evidence was sufficient to sustain a conviction. *See State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). When an accused challenges the sufficiency of the evidence, this Court’s standard of review is whether, after considering the evidence in the light most favorable to the State, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are “so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone.” *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and “[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). “Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the

witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

*Bolin v. State*, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

In order to sustain a guilty verdict for aggravated sexual battery, the State must prove the Defendant engaged in “unlawful sexual contact with the victim . . . when the victim is less than thirteen (13) years of age.” T.C.A. § 39-13-504(a)(4) (2002). “‘Sexual contact’ includes the intentional touching of the victim’s . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.” T.C.A. § 39-13-501(6) (2002). “‘Intimate parts’ includes the primary genital area, groin, inner thigh, buttock or breast of a human being.” T.C.A. § 39-13-501(2) (2002).

At trial, Patterson testified that the victim was ten years old at the time of the incident. The victim testified that she was asleep on the couch located in the Defendant’s living space. He picked her up off the couch and took her to his bedroom. The Defendant proceeded to remove his pants and undergarments and “hump” the victim while her undergarments were still on. His penis touched her vagina through her undergarments. This evidence is sufficient to survive a motion for judgment of acquittal on a charge of aggravated sexual battery. The Defendant is not entitled to relief on this issue.

### **C. Sentencing**

Finally, the Defendant challenges his sentence in that he alleges the trial court improperly began its analysis at twelve years instead of the statutorily required eight years. We initially note that the Defendant’s crimes occurred in 2002, and he was sentenced under the sentencing scheme applicable at that time.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm’n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts

which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. See T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The jury convicted the Defendant of aggravated sexual battery, a Class B felony. T.C.A. § 39-13-504(b) (2002). The Defendant, a range I offender, had a statutory sentencing range of eight to twelve years. T.C.A. § 40-35-112(a)(2) (2002). Pursuant to statutory law, the court was required to begin at the minimum of the range, eight years, enhance if necessary and then mitigate. T.C.A. § 40-35-210(c), (e) (2002).

The record shows the trial court did precisely what it was required to do. The defense counsel stated, "Your honor starts at a presumptive ten . . . ." The court responded that counsel was incorrect, and sentencing began at eight years. In imposing the sentence, the court stated, "This is a Class B felony, eight to twelve years. I start at the presumptive sentence of eight, go up and come down, should there be any enhancing and mitigating factors." The court enhanced the Defendant's sentence from eight to twelve years based on his abuse of a position of private trust and then mitigated the sentence based on his low IQ to eleven years. The trial court followed the proper procedures in imposing the sentence. The Defendant is not entitled to relief on this issue.

### **III. Conclusion**

We agree with the result reached by the trial court when it determined that the extrinsic evidence about where the victim gained her sexual knowledge should be excluded. We further conclude that the trial court committed no error in denying the motion for judgment of acquittal or in sentencing the Defendant. As such, the judgment of the trial court is affirmed.

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ROBERT W. WEDEMEYER, JUDGE